19826

No. 171.

Brf. of Waters for

Filed Mar. 5, 1901.

Office Supreme Court U. S.
FILED
MAR 5 1901
JAMES H. MCKENNEY,
Clerk.

In the Supreme Court of the United States.

OCTOBER TERM, 1900.

No. 171.

ELEANOR A. H. MAGRUDER, PLAINTIFF IN ERROR AND BELOW,

vs.

GEO. A. ARMES, A. A. WILSON, MARSHAL, ET. AL., DEFENDANTS.

BRIEF FOR MRS. MAGRUDER, Plaintiff.

J. J. WATERS,

Attorney for plaintiff, Mrs. Magruder.

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BRIEF FOR MRS. MAGRUDER, Plaintiff.

STATEMENT OF CASE, QUESTIONS RAISED, &C.

Section 1. This is an action for damages for illegally and wantonly levying upon a valuable lot of ground, the separate property of the married plaintiff, for the purpose of selling and sacrificing the lot to satisfy an irregular or void judgment against her, and then compelling her to pay a large sum of illegal and unfounded costs to save her property from being sacrificed by such forced sale. The schemes of Armes, the leader of the proceedings, began on a petty scale of fraud, but wound up on a very large one.

Sec. 2. The case comes here on a writ of error to the Court of Appeals of the District of Columbia to bring up a judgment affirming a judgment of the Supreme Court of said District at a circuit court special term sustaining a demurrer to the declaration of plaintiff in instituting this suit, upon the ground, in effect, that such declaration showed no cause of action (pp. 5 and 6 printed Record). The declaration was based upon a continuous trespass from the

issue and levy of an irregular or void execution under a defective, and, as we charge, a void judgment, against said married woman, and her husband, and pending a right of appeal therefrom, down to the compelling of plaintiff herein, as one defendant in such judgment, to pay a large sum of illegal costs to save her property as before stated. Armes' schemes originally began by trying to defraud the present plaintiff by illegal witness fees, which he tried to have twice paid under cover of proceedings therefor in the clerk's office of the said Supreme Court, and he wound up by trying to get an illegal but apparent title to a valuable piece of real estate.

The declaration commenceing this suit gives a full history of the various matters complained of, shows the various grounds of complaint, and also shows such other proceedings, whether reviewable collaterally or not, as give intelligibility to the complaints, and show that nothing wrong was waived or acquiesced in by silence or inaction (pp. 1 to 5, Record.)

The defendants here pushed everything to extremes in their proceedings against the plaintiff herein, they having very little regard for anything outside of their wishes, and consequently we avail ourselves of every legal point to call them to a just account.

Sec. 3. Armes recovered a judgment against plaintiff herein, on the formal verdict of a jury as directed by the judge, for witness fees alleged to be allowed by law or statute, and such judgment was entered in common law form, without any restriction as required by the statute as to executions then against married women (see Sec. 730 R. S. D. C.), and was also entered against her husband as surety, on an appeal bond in the case by which the matter had been brought back into court, where it belonged, from a justice of the peace where Armes had carried it (see marg.pp. 3 and 4 Record). Had we known that the court or judge would not have stopped Armes' doings, we would have let it stayed

with the magistrate, and had Armes and his assistants called to account by other authority.

So here is our first question. Was this judgment void, and no foundation for subsequent proceedings under it, or was it only irregular, as claimed by our Court of Appeals? (see part 3 of the opinion of our Court of Appeals in this case on pp. 11, 12, Record, in opposition to this honorable court in Bank *vs.* Partee, 99 U. S. 325, 326, 330, 331 and 332, followed 111 U. S. 67, and 5 Mackey, 312.

Sec. 4. To enforce the above noted judgment, Armes, through his attorneys, had issued a *fieri facias*, directed to said Wilson as marshal for this District, which required him to make an unqualified seizure of property, without any allowances by law for things exempt from execution for debt to either party affected, and without being made leviable only out of the sole and separate estate of the wife as required then by Sec. 730, R. S. D. C., and also included interest which was not given in the judgment, if allowable, and a fee to Armes' attorney as allowed in the circuit and district courts of the United States, outside this District (see pp. 1 and 2, Rec.). So here is our second question: Was such an execution valid and a sufficient authority for the marshal, even if said judgment was good?

Sec. 5. Plaintiff herein, and her husband, each had a right to appeal from said erroneous judgment, especially if it was without jurisdiction, to our Court of Appeals, within twenty days therefrom, and to give a supersedeas bond within such time to prevent an execution. This was by the 10th Rule, parts 1 and 2, of our Court of Appeals, its decision in Sturges *vs.* Hancock, 4 App. D. C. 287, since confirmed in Wash. Law Rep., Vol. 28, No. 52, p. 887, and the act of Feb. 9, 1893, Sec. 7, creating said Court of Appeals. But within six days after said judgment, before any such appeal was taken or bond given, Armes had issued the execution hereinbefore stated, from the office of the clerk of the court, and levied such writ upon a valuable lot

of ground as before stated, worth about $1,800, being the separate property of Mrs. Magruder, and also levied upon her husband's tenancy by the curtesy therein, and in eleven days from levy advertised the interests in said lot for sale. This was an unexpected and spiteful proceeding, and an excessive levy to satisfy such a petty judgment, which could have been made out of furniture in the lady's residence in this District. Now, instead of a futile appeal, we had to await the effect of this oppressive and sinister proceeding, and to look out for means to stop our unscrupulous adversary (see marg. p. 5, first paragraph, and marg. pp. 1 and 2, Record).

Sec. 6. The above writ and levy plaintiff herein endeavored to have quashed; but this was prevented by defendants herein, and from the order, which was final, of the judge or court refusing to quash such writ and proceedings thereunder, plaintiff herein, and also her said husband, duly entered an appeal to the said Court of Appeals, with proper citation, served on Armes, which took the case out of the jurisdiction of the lower court; but said defendants herein still persevered under said writ and seizure in the attempt to sell and sacrifice said lot, and were only prevented by plaintiff paying them, under protest, about $90, a sum which covered outrageous and illegal costs in advertising and otherwise (see p. 4, Record).

From the things stated in this and the preceding section arises our third question, namely: Was not the issuance and levy of the execution stated, and attempted sale thereunder, while the plaintiff herein had a right to, or was actually appealing, a tortious and illegal proceeding, for which the actors are answerable in damages, and even if the judgment and writ had been in legal shape?

Sec. 7. As we have shown in section 5 of this Brief, the writ complained of was levied upon a valuable lot of ground, worth about $1,800, being the separate estate of Mrs. Magruder, and also levied upon her husband's interest

or tenancy by the curtesy therein (see marg. p. 5, first paragraph, with marg. pp. 1 and 2, Record). Now the petty judgment, and lawful costs added, could have been made alone amply out of Mrs. Magruder's interest in fee, and it was an excessive levy to have seized the interests of both husband and wife, as well as it was forbidden to seize her property, or her husband's prospective interest or tenancy by the curtesy initiate therein, for his debt, as per Sec. 727, R. S. D. C., and Hitz *vs.* Nat. Met. Bank, 111 U. S. 722–'3, 729 to 733. The motive of the seizure was probably to make an apparent complete title for Armes to buy for a petty price and then sell for a good sum.

From this seizure arises our fourth question: Was said levy lawful, and can not Mrs. Magruder sue for damages for such alone, as one good cause of action?

Sec. 8. In section 6 of our Brief, which see, we have set out the coerced payment to the defendants herein of about $90 to save the property of Mrs. Magruder. The marshal for such defendants, on the day after she took an appeal from the order of the judge refusing to quash said execution and levy, and before she could give the supersedeas bond required, was going to sell the lot he had levied on, and required Mrs. Magruder to pay $89.94 to save her property from being grossly sacrificed, or sold to Armes. This included about $50 for advertising the lot for sale, a very largely unfounded and illegal charge in itself. Under the compulsion or *duress colore officii* in the case, and under protest against such demands as invalid for sundry reasons, the $89.94 was paid, and the lot saved (see marg. pp. 6 and 3, Record). Hence arises our fifth question.—Was such payment valid and voluntary in law, or was it an official extortion in itself or otherwise for which an action of damages in the fullest sense can be maintained?

Sec. 9. In the endeavor by proper legal steps to correct the misdoings of Armes and his assistants from the defective judgment down, Mrs. Magruder, after said payment, in ad-

dition to her appeal and citation to Armes thereon to appear in said Court of Appeals, duly tendered to said judge the appeal bond necessary for the indemnity of the appellee, in valid shape and with good surety, such tender being on 22d May, 1896, and with proper proof of notice to the appellee, so that appellant was entitled to have said bond approved, but the judge withheld the approval, and refused the same, in the absence of the appellants' counsel, the day following, at the instance of Armes' counsel (see marg. p. 6, last part, Record). As enough money had been extorted to pay the judgment and charges demanded, and as this could not be gotten back by a mandamus to compel the approval of said bond as claimed to be needed for the perfecting of said appeal, the appellant could not reasonably do anything further in the matter, but had to look to another suit or way to get redress.

Hence arises our sixth question. Did the destroying or suspending of said appeal validate any of the previous proceedings of Armes and his friends?

Sec. 10. We think our declaration shows serious abuse of the powers and process of the court where the alleged judgment was given, and the charges can be fully and readily proved, but the facts stated in our declaration are all admitted by the demurrer interposed and sustained by the judge who heard it. So the facts of the case are in the printed Record from pp. 1 to 5. On p. 5 also appears the demurrer, alleging five grounds of legal deficiency in our declaration, all of which amount to the assertion that our declaration shows no cause of action whatever.

Sec. 11. But the complaints we make we think serious enough in themselves, and when they are backed by a willful and malicious spirit and attempt to grossly defraud a married woman out of valuable property under color of a void judgment, and of a United States marshal's process, and upon failure to do so, to coerce $50 out of her illegally and unjustly, as well as to try to prevent proper steps from

being taken to rectify such judgment, and proceedings thereunder, in such case, which is the one we present, we think all parties concerned should be made to pay full and exemplary damages as a compensation, civil punishment and warning for such misconduct, and more especially as we know of no other ample and complete redress, and as this is not the first case in which plaintiff herein has had to defend herself against Armes and his friends. And considering these things, and that ill behavior, as well as loss of property or money, and though in a smaller degree than we have endured, were grounds for large damages in other cases, as in Scott *vs.* Donald, 165 U. S. 58; Goddard *vs.* Grand Trunk Railroad Co., 57 Maine, 202, and other cases, we have laid our *ad dammum* in the conclusion of our declaration, at top of p. 5 Record, at a sufficiently broad basis, $6,000.

If a man destroys $10,000 worth of property because the owner will not give him $1 unjustly demanded, is that man excused by the smallness of his attempted extortion? If not, then Armes is not excused by the original pettiness of his original demands.

Further, it is an element against the marshal in the case that he allowed his office to be used by such a malicious and unprincipled man as Armes was known to be, one of his notorious acts being his assault upon Governor Beaver at President Garfield's inauguration, and another his insulting letter to General Schofield on his retirement from the head of the Army, for which Armes was arrested, but released by habeas corpus by the very judge who rendered the judgment for Armes, and sustained his subsequent proceedings complained of in our present case. But in the habeas corpus case, Classon *vs.* Armes, 7 App. D. C. 460, that honorable judge was reversed, which induced him to be very sarcastic when the mandate was presented to him.

Sec. 12. The judge who heard our present case on demurrer, sustained it as to everything in our declaration, in

a verbal opinion, and as we could make no change or alleged amendment to the declaration, in such a case, without an entire departure in pleading to an imaginary and unprovable case, final judgment was given against us, as see p. 6, Record. From this we appealed to our Court of Appeals (same page), but it did not think our case, which it pronounced "an extraordinary case both as to subject-matter and joinder of parties" (see part 2 of opinion, bottom of p. 10, etc., Record), worthy of much consideration (although it extraordinarily analyzed our case into 18 parts, as see pp. 9 and 10, Record), and so after hearing it argued, the honorable court filed an opinion considering the said defective judgment as not void, although wanting in the *necessary* limitation or award of execution to the sole and separate estate of the *feme covert*, as they had before admitted was required, and adjudged this honorable court's opinion in Bank *vs.* Partee, 99 U. S. 325, 326, 330 and 332, did not apply in this District, although it was the foundation of Offutt *vs.* Dangler, 5 Mackey, 313, 315 and 317, which has been followed here ever since, and having so sustained the judgment complained of, the honorable court called the other rather serious questions in the case "unimportant" (see parts 3 and 4 opinion, pp. 11 and 12, Record). So the judgment below sustaining the demurrer was entirely affirmed (p. 12, Record).

Here is another conflict, as we judge, with this honorable court, it not being the first one, as well as good cause for dissatisfaction as to other points outside the judgment, so we sued out a writ of error to this honorable court and brought the case here (p. 13, Record).

Sec. 13. We also very respectfully submit that the points involved in our first and second questions, in Secs. 3 and 4, this Brief, as to what is the valid form of a judgment on express or implied contract, and of an execution to enforce such, against a married woman, under the statute authorizing such, that such points are of constant importance, and

worthy of the determination of any tribunal, even if the other questions in our case are not noticed, and especially as the local decisions and practice in this District are in conflict with this honorable court, as we believe, and good precedents elsewhere. Such points, we submit, are good reasons for seeking in some way, when they occur, the decision of this eminent and ultimate tribunal.

ASSIGNMENT OF ERRORS, ETC.

Sec. 14. Our Court of Appeals, we submit, erred in the judgment and opinion we have brought up in the following instance:

First. In affirming the judgment of the Supreme Court, District of Columbia, which sustained the demurrer to the declaration in this suit as showing no cause of action on any point, and gave final judgment against the plaintiff therein (pp. 6 and 12, Record).

Second. In deciding, with the original court, that the judgment against a married woman who is plaintiff herein, and which judgment is questioned in the declaration in this suit (p. 3, Record), was not void and could not be collaterally attacked (as see part 3 of opinion, pp. 11 and 12, Record).

Third. In holding that the form and requirements of the execution issued on the judgment against such married woman and which is questioned in said declaration (p. 2, Record), was "unimportant," as the judgment questioned was not void in said Court of Appeals' opinion (part 4, p. 12, Record).

Fourth. In holding that the "prematurity of the writ," that is, the issuance and levy of the execution stated, and the attempted sale thereunder, while the plaintiff herein had a right to appeal, or was actually appealing in the case, was also "unimportant" if the judgment under which it

issued was not void (as see said part 4, p. 12, and marg. pp. 5 and 6, Record).

Fifth. In holding that the manner of levy of said writ, that is, the levy upon both the interests of husband and wife in *her* separate property, and advertising such for sale, was also "unimportant," as the judgment under which such was done was not, in its opinion, void (as see said part 4, p. 12, and marg. p. 5, first part, and marg. pp. 1 and 2, Record).

Sixth. In holding that the effect of the payment of the marshal's demands under said writ, which included excessive and illegal charges, was also "unimportant" if said judgment was not void (as see said part 4, p. 12, and marg. pp. 6 and 3, Record).

We claim that even if the judgment complained of in our declaration was not void so as to be no defense to proceedings under it, yet that the proceedings to enforce it, which are stated in our declaration, were in themselves illegal and made good causes of action in suing.

Wherefore plaintiff prays a reversal of said judgment by said Court of Appeals and a judgment herein in favor of plaintiff on said demurrer.

ARGUMENTS AND AUTHORITIES.

Sec. 15. Our first assignment of error includes many grounds of support, of which we will present the objections against the judgment complained of as entered against the plaintiff herein as a married woman, which judgment and objections appear on p. 3, Record.

Sec. 16. Judgments on contracts against married women are void at common law, which is in force in this District

and courts have no jurisdiction, outside of statutes, to enter such here.

Bank *vs.* Partee, 99 U. S. 325, 326, 330 and 332.
Griffith *vs.* Clarke, 18 Md. 457, 463, 464.
Offutt *vs.* Dangler, 5 Mack. 313, 316.
Jackson *vs.* Hulse, 6 Mack. 548.
Mallett *vs.* Parham, 52 Miss. 921 and 923.

Sec. 17. Jurisdiction is the authority of courts to hear and adjudge matters, and the only jurisdiction to proceed against married women at law in this District is given in Secs. 729 and 730, R. S. D. C., which govern the proceedings complained of in our case, such having occurred before the amendatory act of Congress of June 1, 1896. Said sections are as follows:

"Sec. 729. Any married woman may contract, and sue and be sued in her own name, in all matters having relation to her sole and separate property, in the same manner as if she were unmarried.

"Sec. 730. Neither the husband nor his property shall be bound by any such contract, made by a married woman, nor liable for any recovery against her in any such suit, *but judgment may be enforced by execution against her sole and separate estate in the same manner as if she were unmarried.*"

Sec. 727, R. S. D. C., gives a married woman an absolute right to any property acquired other than by gift or conveyance from her husband, and such property was not to be subject to disposal by the husband, *nor liable for his debts.* Sec. 728 gave her the right to convey or will such property.

Sec. 18. The later act of Congress of June 1, 1896, above referred to is here inserted in full for the convenience of the court:

"An Act To amend the laws of the District of Columbia as to married women, to make parents the natural guardians of their minor children, and for other purposes.

"*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That the property, real and personal, which any woman in the District of Columbia may own at the time of her marriage, and the rents, issues, profits, or proceeds thereof, and real, personal, or mixed property which shall come to her by descent, devise, purchase, or bequest, or the gift of any person, shall be and remain her sole and separate property, notwithstanding her marriage, and shall not be subject to the disposal of her husband or liable for his debts, except that such property as shall come to her by gift of her husband shall be subject to, and be liable for, the debts of the husband existing at the time of the gift.

"Sec. 2. That a married woman, while the marriage relation subsists, may bargain, sell, and convey her real and personal property, and enter into any contract in reference to the same in the same manner, to the same extent, and with like effect as a married man may in relation to his real and personal property, and she may, by a promise in writing, expressly make her separate estate liable for necessaries purchased by her or furnished at her request for the family.

"Sec. 3. That any married woman may carry on any trade or business, occupation or profession by herself, or jointly with others, and perform any labor or services on her sole and separate account, and the earnings of any married woman from her trade, business, profession, occupation, labor, or services shall be her sole and separate property, and may be used and invested by her in her own name.

"Sec. 4. A married woman may contract, and sue and be sued in her own name in all matters having relation to her sole and separate property, in the same manner as if she were unmarried; and her husband shall be joined with her, when the cause of action is in favor of or against both her and her husband.

"Sec. 5. Neither the husband nor his property shall be bound by any such contract, made by a married woman, nor liable for any recovery against

her in any such suit, but judgment may be enforced by execution against her sole and separate estate in the same manner as if she were unmarried, but she shall be entitled to all the benefits of all exemptions to the heads of families or householders.

"Sec. 6. That nothing in this act contained shall invalidate any marriage settlement or contract.

"Sec. 7. That the husband shall not be liable for the payment of the wife's antenuptial debts, but she shall be liable to all remedies for the recovery of such debts, to be enforced against her and her separate property as if she were unmarried.

"Sec. 8. That the father and mother shall be the natural guardians of the person of their minor children. If either dies or is incapable of acting, the natural guardianship of the person shall devolve upon the other: *Provided, however*, That in the case of the death of either parent from whom the said children may inherit, or take by devise or bequest, the said parent may, by deed or last will and testament, appoint a guardian of the property of the children, subject to the approval of the proper court of the District of Columbia.

"Sec. 9. That the survivor may by last will appoint a guardian of the person and property of any of the children, whether born at the time of making the will or afterwards, to continue during the minority of the child, or for a less time, subject at all times to removal for cause and appointment of another by the proper court.

"Sec. 10. That dower shall hereafter be assigned to a widow entitled to the same in the equitable as well as the legal estate of her deceased husband.

"Sec. 11. That sections seven hundred and twenty-seven, seven hundred and twenty-nine, and seven hundred and thirty of the Revised Statutes of the United States for the District of Columbia, be and the same are hereby repealed.

"Approved June 1, 1896."

Sec. 19. It will be seen that the fourth and fifth sections are like above sections 729 and 730, R. S. D. C., with ad-

ditional rights, but judgments must still be enforced in the same manner, and as the act is not retroactive, vested rights of husbands must be still respected in executions to enforce judgments against married women. And as the first section of the last law has the same prohibition against making the husband's debts out of his wife's property as section 727 R. S. D. C., referred to briefly above, has, that restriction also still remains, and such restriction helped to invalidate the execution we call in question in our declaration (as see pp. 1, 2 and top of p. 4, Record).

Sec. 20. Now, for the courts to keep within their jurisdiction against married women at law, under either law above, they must proceed according to the requirements of said statutes shown above, and especially the first law in sections 729 and 730, R. S. D. C. quoted.

Bank *vs.* Partee, 99 U. S. 325, 326, 330 and 332.
Offutt *vs.* Dangler, 5 Mackey (D. C.), 313 and 315 to 317.
Casey *vs.* Dixon, 51 Miss. 593, 594, 598 to 601.
Bank of La. *vs.* Williams, 46 Miss. 629, 618 and 619.
Mallett *vs.* Parham, 52 Miss. 921 to 923.

Sec. 21. Jurisdiction in *proceedings* may be exceeded, and so it was in the case we complain of in our declaration.

Windsor *vs.* McVeigh, 93 U. S. 274, 282 and 283.

Sec. 22. Acts of courts without jurisdictson can be collaterally called in question and *all* persons enforcing their judgments in such excess of jurisdiction are TRESPASSERS, etc., and so we assail the proceedings of said Armes by suing all concerned with him, except the court and its clerk (see p. 1, Record).

Elliot *vs.* Piersol, 1 Peters, 328 and 340.
Bank *vs.* Partee, 99 U. S. 325 and 326.
Tenney *vs.* Taylor, 1 App. D. C. 223.
Offutt *vs.* Dangler, 5 Mackey, 313, 315 to 317.
Casey *vs.* Dixon, 51 Miss. 593 and 594.

Sec. 23. No matter if the proceedings or pleadings, prior to the judgment we assail in our declaration, were in proper form against a married woman, yet the judgment itself not being in conformity thereto, nor in lawful shape as concerns execution thereof, was void.

Mallett *vs.* Parham, 52 Miss. 921 to 923.
Bank of La. *vs.* Williams, 46 Miss. 629, last part of page.
Both above cases are cited in Bank *vs.* Partee, 99 U. S. 332.

Sec. 24. Again, the judgment against a married woman should have *conformed* to the declaration or account it was rendered on, and if it does not, as in the judgment we attack in our declaration, then it is void for that reason also. The plaintiff herein was sued in a *special capacity*, as married women had to be in this District, and the judgment should have conformed to such capacity, otherwise it is void. This is also illustrated by suing executors, co-partners and the like, in their special capacities, and yet taking judgment against them personally, which is fatally defective.

Galpin *vs.* Page, 18 Wall. 350, 351, 365 to 369.
Cox and Dick *vs.* U. S., 6 Peters, 172 and 200.
Pinchin *vs.* Fry, 1 Dallas, 405.
Smith, Exr., *vs.* Chapman, Exr., 93 U. S. 41 to 43.
Siglar *vs.* Haywood, 8 Wheaton, 675 and 680.

Sec. 25. Even if the judgment called in question by us could have been amended or set aside for a better one, yet that does not render it as it stands a valid judgment. If it did, then, in the various cases cited agatnst invalid judgments, the judgments were good in law, although the courts condemned them, even collaterally. As parties against whom void judgments are rendered, need not have them first reversed or set aside before collaterally assailing them,

so they need not notice or amend them. The holders of such judgments must see that they are rectified, if they can be, and in due season.

Elliott *vs.* Piersoll, 1 Peters, 328 and 340.
Harper *vs.* Cunningham, 8 App. D. C. 430 and 439.

Sec. 26. The propriety of restricting executions against married women to their separate property must be manifest. For if such women could be taken on a *capias ad satisfaciendum*, or restrained by a writ of *ne exeat regno*, it would invade the family, and be against humanity, decency and public policy, as well as the just rights of the husband and children. See the comments in Bank *vs.* Partee, 99 U. S. 330, so often cited by us.

Now, judgments against married women must have an award of execution according to the statute and against their separate property, otherwise the judgment would demand too much. And if the court does not limit the execution in the judgment, then the matter would also be left to the ascertainment of the clerk of the court to say what execution should issue, whereas such judicial duty belongs to the court.

It is the practice in this District to make common law judgments consist of the *quod recuperat* or recovery, and of the fiat or award of execution, and in entering judgments against married women, the award of execution *must necessarily be limited* according to the statutes, otherwise it would be a fatal defect, and not a mere informality.

Sec. 27. The form of a void judgment, and the form of a valid judgment against a married woman, are well given in Mallett *vs.* Parham, 52 Miss. 921 to 923, often cited by us.

Our Court of Appeals, in part 3, pp. 11 and 12, Record, in this case tries to get rid of the logical and proper conclusion of the Mississippi court, that a common law or ordinary judgment is void, *but nowhere shows any good reason for doing so*, but on the contrary its own rulings in correcting or

commenting on judgments with an unlimited award of execution against married women, *shows the necessity of the correction.* How does a judgment, wanting a necessary and legal award of execution *differ* from a *void* one?

Our Court of Appeals in said opinion says the Mississippi statute is different from ours. But the difference is not sufficient to alter the requisites of a judgment against a married woman to a different form from that required by the Mississippi statute, and so our court in general term adjudged in Offutt *vs.* Dangler, 5 Mackey, 313, following Bank *vs.* Partee, 99 U. S. 325 and 326, and such has ever since been considered the law as to pleadings against married women. Statutes may differ in some details, as they often do, but still require the same principle of construction, and the Mississippi construction having been received into this District from this honorable court in Bank *vs.* Partee, it is not to be expected that this court, contrary to its usual good rule, should now ignore its reasoning in said case. This court has the credit highly of adhering to its precedents on similar statutes and questions.

The court that first heard this case, although sustaining the demurrer against us, tacitly conceded our objections to its usual form of judgment seen on p. 3, Record, by entering a judgment against us in a form to obviate our objections, and in effect following the Mississippi form, as see the judgment on p. 6, Record. So this court can see the contrast in this case itself.

Sec. 28. But our honorable Court of Appeals seems, unfortunately, to be of a wavering mind, both as to questions concerning married women and other matters, and hence to announce decisions not easily reconciled with decisions by this court or previously by itself. Thus in McCormick *vs.* Hammersley, 1 App. D. C. 313, it held that a married woman under the married woman's act could not contract with her husband at law, in opposition to this court in Sykes *vs.* Chadwick, 18 Wall. 141 and 142, holding that she

could take a promissory note from her husband for her dower and even sue him on it. Again, in Foertsch *vs.* Germuiller, 9 App. D. C. 351 and 356, it held husband and wife could not testify for each other under Secs. 876 and 877, R., S. D. C., and claimed to follow Lucas *vs.* Brooks, 18 Wall. 436, 452 and 453, but in Lusby *vs.* Capital Traction Co., 12 App. D. C. 295, 305 and 306, it decided the contrary way, professing to follow Hopkins *vs.* Grimshaw, 165 U. S. 350 and 351. Again, in Magruder *vs.* Belt, 12 App. D. C. 151, it held that a verdict and judgment could be given against a husband, although he had been "dropped out" by a previous verdict which did not name him when he was sued jointly with his wife, such holding being contrary to its decision in Lansden *vs.* Washington Gas Light Co., 9 App. D. C. 508 and 540, and to the opinion of this court in the same case in 172 U. S. 535 and 556, holding that joint defendants not named in an adverse verdict were acquitted or had in effect a finding in their favor.

Again, the court has a general rule that no question not raised in the courts below will be considered by it, and yet it considered the objection to a judgment against a married woman that it did not have a valid award of execution, made in the appellate court as a jurisdictional matter for the first time, and decided it was not jurisdictional, and yet amended the judgment in accordance with the objection. Now, could it do this under its rule, especially if the defect was only an informality, and waived by failure to object in the court below? This was in Foertsch *vs.* Germuiller, cited above, about testimony of husband and wife, and also cited in the opinion on p. 11, Record, as to ruling on judgments against married women by said Court of Appeals. Said honorable court seems to esteem it to be more its duty to find reasons to affirm judgments and check appeals, than to be precise about logic and consistency and the correction of legal errors, although such views make the harm of uncertain law. A further contrast of the views of that court

with this court can be seen in the cases collected from both courts under the heading of "Reversible Error" on p. 418 of the Washington Law Reporter of June 14, 1900.

Sec. 29. Full power to a married woman to protect or enforce her property rights by suing at law, is given by Sec. 729, R. S. U. S., quoted in Sec. 17 of this Brief. Hence she is no longer obliged to resort to equity in many cases. And this section answers the first ground of the demurrer to our declaration on page 5, Record. And our understanding of the statute is supported by this honorable court in the aforecited case, on appeal from this District, of—

Sykes *vs.* Chadwick, 18 Wallace, 141 and 142.

Sec 30. In calling in question the jurisdiction of the court to render the judgment complained of in our declaration on page 3, Record, we have followed this court in Elliott *vs.* Piersol, 1 Pet. 328, in suing *all* as trespassers (as see Sec. 22 of our Brief and p. 1, Record), and yet our Court of Appeals calls it "an extraordinary case," etc. (p. 10, part 2, Record). But in joining the attorneys in the case as defendants we had not only a right, as they assisted an active tort, but we were impelled by the "extraordinary case" of Barrick *vs.* Geyer, 5 Mackey (D. C.), 32, by which it was held that attorneys owned the taxable allowance for them, although the plaintiff owned the witness and other fees! This makes an attorney a part owner of a judgment and principal in enforcing it, contrary to the reimbursement theory in Sec. 983, R. S. U. S., and in Secor *vs.* Steamboat Highlander, 19 How. Prac. Rep. 334, 342, 343 and 346, this publication being a New York report, but having Federal cases in the reports.

Sec. 31. We have presumed to tax the patience and time of this honorable court in discussing the validity of the judgment against a married woman complained, in reference to the *form* of such judgments, because such a feature is the leading objection in our case and in our first assign-

ment of error, and is of importance in all judgments against married women.

Sec. 32. But as our adversaries made a most outrageous abuse of the jurisdiction and process of the original court in enforcing their petty judgment obtained therein, we must also show that their whole proceedings were really illegal, notwithstanding the small scale on which Armes attempted his fraudulent schemes at the beginning. So there are two points affecting the *substance* of the judgment attacked (see marg. p. 4, Record), which we will endeavor to show to invalidate such judgment.

Sec. 33. The judgment on page 3, Record, is entered also against a "surety," who had signed as stated on said page 3, a paper called an undertaking, before the justice of the peace from whom the case was brought up by appeal, it being a condition of appeal under section 3, act of February 19, 1895, Ch. 100: "To extend the jurisdiction of justices of the peace," etc., such section being as follows:

> "That no appeal shall be allowed from the judgment of a justice of the peace in any common law action unless the matter in demand in such action or pleaded in set-off thereto, shall exceed the sum of five dollars, nor unless the appellant, with sufficient surety, approved by the justice, enters into an undertaking to pay and satisfy whatever final judgment may be recovered in the appellate court."

This section does not authorise judgment to be taken against the surety without process, nor does it operate against the surety unless the principal fails in his case, and fails to pay the judgment resulting. But, as shown in marg. p. 4, Record, the undertaking under consideration had no one named as obligee, and no process was served on the surety, and the "undertaking" and judgment thereon exceeded legal authority, etc. Such extorted, unauthorized and defective judicial obligations, and the judgments

thereon, have often been condemned as void. And so the judgment discussed was void as to said surety.

United States *vs.* Draper, 19 D. C. 85.
Insurance Co. *vs.* Hosmer, 1 Mackey, 297.
Omaha Hotel Co. *vs.* Kountz, 107 U. S. 378.
Tenney *vs.* Taylor, 1 App. D. C. 223.

Now, at common law, a joint judgment that is void as to one judgment debtor, is void as to all. So, in the judgment we complain of, it being void as to the "surety" therein, is void as to the other judgment debtor, the complaining plaintiff in this suit.

Jackson *vs.* Hulse, 6 Mackey, 548.

Sec. 34. "Said judgment was rendered upon an alleged charge by law of $1.25 a day to said Armes for attending said court as alleged, as a witness in a certain suit at law, No. 30,689, for this plaintiff, but was without law or merit . . . and said judgment could not be entered for a larger fee to the plaintiff therein as a witness than the law authorized in such a case" (so see the allegations of our declaration in marg. pp. 3 and 4, Record).

Hence, again we claim the assailed judgment was void, for can it be valid in face of express statutes? For this District a dollar a day is the whole per diem allowed by statute to a witness; that is, if the Maryland statute apopted by act of Congress of February 27, 1801, and later, is obeyed as originally required, as to witness fees.

Secs. 880 and 92, R. S. D. C.
Kilty's Laws of Md., Vol. 2, act of 1797, Ch. 94, Sec. 6.

Sec. 35. The *fi. fa.* issued to enforce the judgment assailed in our declaration, gives us another cause of action, outside of the judgment itself, and was the active means of bringing about this suit. Such writ is set out fully on p. 2, Rec-

ord, and there also are alleged its defects, fatal, as we claim, namely—

> "it was not made leviable only out of the sole and separate estate of said plaintiff—made no allowances for any of the exemptions from execution for debt allowed by law; furthermore, said writ called for interest when the judgment and verdict in case gave none, and charged in the costs twenty dollars for said Armes and his attorney, which not allowed by law," etc.

It was an unqualified writ to the marshal *to seize anything* belonging to wife or husband, and we submit, could be no legal authority to justify him in any way in acting. The tenancy by the curtesy, and the household goods, etc., to a certain amount, of the husband and surety, and any property acquired from the husband by the wife, could not be levied on for their particular obligations. The interest was not part of the judgment on p. 3, Record, and the taxable fee for an attorney could not exceed ten dollars.

Secs. 730, 727 and 797 R. S. D. C.
Mallett *vs.* Parham, 52 Miss. 921 to 923,
Bank of La. *vs.* Williams, 46 Miss. 629, last part of page.
Bank *vs.* Partee, 99 U. S. 325 and 330.
Magruder *vs.* Belt, 7 App. D. C. 303, 313.
Foertsch *vs.* Germuiller, 9 App. D. C. 351.

Sec. 36. There is no statute operating in this District to give the $20 run into the costs in such *fi fa*, for Armes' attorney on his petty judgment. It is an allowance in the Circuit and District Courts of the United States, and then only on sums above $500 and $300, (as see Sec. 20, act of Sept. 24, 1789, 1 Stats. 83, Ch. 143, now appearing in Sec. 968, R. S. U. S). The heading and first part of act 26 Feb. 1853, Ch. 80, 10 Stats. 161 and 162, also show it does not apply in this District, and especially as it had to be extended to three Territories by act 3 March, 1855, Ch. 175

Sec. 12, 10 Stat. 671, and to clerks of our courts by act 3 March, 1883, Ch. 143, "Judicial," 22 Stats. 631. Sec. 903, R. S. D. C. fixes any taxable fee at not over $10, and Sec. 1296, R. S. D. C. shows it to be the last law, and having the effect of repeal of the R. S. U. S. if in conflict, (as see Sec. 5601, R. S. U. S. and Secs. 93, R. S. D. C., as to U. S. Statutes not inapplicable and 823, R. S. U. S. for fees where no other provision show that our local law *must* govern as to amount of fee, as outside provisions are in conflict or are not applicable). But this honorable court has shown that this District or territory does not go with the Circuit and District Courts of the United States, properly speaking, and that the fee act of February 26, 1853, was made to apply here only to court clerks by subsequent provision.

United States *vs.* McMillan, 165 U. S. 504, 507, 509 and 510.

Sec. 37. We claim the $20 taxed in costs was beyond the jurisdiction of the court and clerk issuing the *fi. fa.*, and was not legally enforceable by the marshal. Such court and officers can not compel persons to pay costs which are not directly or indirectly authorized by statute. Courts can not legislate on such subjects. Costs are not allowed at common law, and are recoverable in United States courts only so far as created by statute, and courts and juries have no jurisdiction to give such except in conformity to statute.

Day *vs.* Woodworth, 13 Howard, 322, 373, 370 and 368.

Flanders *vs.* Tweed, 15 Wallace, 450, 452 and 453.

Oelrichs *vs.* Spain, 15 Wallace, 230 and 231.

2 MacArthur, (D. C.) 207 (3 Dallas, 306).

Sec. 38. What we have set forth in above Secs. 15 to 37, we very respectfully submit in support of our first three assignments of error in Sec. 14 hereof, and in answer to the three first grounds of demurrer alleged in marg. p. 8 Record.

But what we shall further say will also help to support our first and general assignment of error, and to answer said demurrer on marg. p. 8, Record.

Sec. 39. To properly and regularly correct the invalid judgment complained of, and to prevent gross abuses through it, we wished to appeal to our Court of Appeals. We have spoken on this subject in Secs. 5 and 6 this Brief. Such right of appeal is given generally in sec. 7, act of Feb. 9, 1893, "an act to create a Court of Appeals, etc.," as we think, notwithstanding the court held the contrary in Ex parte Redmond, 3 App. D.C. 317, but the court has twice conceded that an appeal in a case appealed to the trial court from a justice of the peace will be to our Court of Appeals where the trial court exceeds its jurisdiction in rendering judgment, as we most strenuously claim it did as respects a married woman and her husband in the judgment complained of. The cases conceding such appeal are—

Sturges *vs.* Hancock, 4 App. D. C. 287.

Mitchell *vs.* Evans, Wash. Law Rep., Dec. 27, 1900, p. 887.

Sec. 40. The time and manner of appeals were and are prescribed by Rule 10 of the Rules of our Court of Appeals, made under Sec. 6 of its organic act of February 9, 1893. By such the time was twenty days, etc., and execution could be stayed by a bond, given within such 20 days, with sufficient surety, to be approved by a judge, "conditioned for the successful prosecution of such appeal" (see Secs. 1 and 2 of said rule). Sec. 4 provided for a dismissal of appeal on failure to give bond, and Sec. 5 called for notice by citation to appellee (see the rule 10 in addition to or last part of Supp. to U. S. Sup. Court Reports, or 4th Digest by L. C. P. Co., on p. 71 of "Rules of all Federal Courts," these Rules of our Court of Appeals, being made in 1894, as see Rule 25, p. 75).

Sec. 41. But before the defendants in said judgment could

perfect their appeal, the defendants in this suit issued execution and made levy upon a valuable lot, worth at least $1,800 (as see marg. p. 5, first part, and marg. pp. 1 and 2, Record). We claim such to have been a gross disregard of law also, and in keeping with the tortious conduct of defendants hereto. What is the value of rules regulating appeals, when such rules can be disregarded? We next had to get rid of this execution and levy necessarily.

Sec. 42. We moved to quash said execution, levy, etc., upon the various grounds, including defects of the judgment and writ, supposed to exist against them, giving full notice thereof, etc., (as see marg. p. 5, second part, Record). This motion Armes and his friends had overruled (as shown in said marg. p. 5, on 6th May, 1896), and from this order, finally destroying any redress, we did appeal in two days, and in good time presented a good supersedeas appeal bond, the approval of which Armes' friends prevented on 23d May, 1896, on a question of law, not of sufficiency, the same judge who made all the other rulings in favor of Armes, indorsing his erroneous refusal on the bond as based on the alleged law that no appeal lay in the case. This appears partly by last part of marg. p. 6, Record. So the lower court decided the question of jurisdiction in place of the appellate tribunal! Said Armes had been cited to appear in the appellate court, as required in Sec. 5 of said Rule 10, as see in last part of marg. p. 6, Record.

Our appeal was not dismissed according to Sec. 4 of said Rule 10, and has never been withdrawn formally, but being completely hindered by the lower court and largely made unavailable (as see section 9 of Brief), had to be virtually abandoned in the end. We could get no record nor our money.

Sec. 43. Notwithstanding our appeal transferred the case into the appellate court, Armes and his assistants endeavored to sell the lot of plaintiff herein, and was only pre-

vented by our paying the marshal an outrageous bill of illegal costs, which was done only under compulsion and stress of the seizure and expected sale, and after due protest. The advertising was governed by act of March 3, 1893 (Ch. 225, Sec. 3, 27 Stats. 751, and by rule of court 107, on page 93 of said 4th Digest, latter part) and the bill was extortionate. The marshal's fees were largely built on such advertising, and he could have made more fees by charging $500 or $1,000, for advertising with as much legal right. His fee bills never appear here in obedience to Sec. 983, R. S. U. S., and Sec. 899, R. S. D. C. How, then, can they be reviewed in the Record on motion?

Sec. 44. We claim our case was taken out of the lower court, for Sec. 2 of said rule 10 is substantially the same as Sec. 1000, R. S. U. S., as to supersedeas bonds on appeal, and we understand this honorable court to say that the want of such bond will not deprive the appellate court of jurisdiction, and we claim the court and all our adversaries here alone acted without jurisdiction.

Dodge *vs.* Knowles, 114 U. S. 438.

Sec. 45. The payment of the illegal charges of the marshal of course was not voluntary, but was extortion at common law in this District, and could not be justified by the marshal getting the money extorted, otherwise there would be no such offense as extortion. And *duress colore officii* could not make an illegally forced payment voluntary, and lawful. Our adversaries were the worst of trespassers all through, showing malice and fraud many ways, and could not be justified where there was some jurisdiction, much less where there was none.

Sec. 46. The attempt to sell the estate of tenancy by the curtesy was not only an excessive levy, but no execution could reach such while the wife lived, as here. It was a high handed trespass, and appeared like a scheme by Armes to get a complete title to a valuable lot, if possible (see top

of pp. 4 and 2, Record). The married lady owning the lot has a legal redress for such, and is not obliged, since the first Married Woman's Act, to go into equity.

Secs. 727 to 730 R. S. D. C.
Sykes *vs.* Chadwick, 18 Wall. 141.
Hitz *vs.* Nat. Met. Bank, 111 U. S. 722.
Uhler *vs.* Adams, 1 App. D. C. 392.

Sec. 47. In regard to our declaration as to form, we must refer this honorable court to Rules 23, p. 82, and 112, and following on pp. 93 and 94 of said 4th Digest, last part, as to substance only being now required, and as to demurrers and formal defects, to Rule 28, p. 82, same Digest, and Stat. 4 Anne, Ch. 16, Alexander's British Statutes, in force in Maryland, pp. 659 and 660. There is no special demurrer nor motion to strike out against our declaration.

And our suit was brought about a year after Armes ceased his illegal steps in court in March, 1898 (as see marg., p. 7, Record).

Sec. 48. We regret very much having to say so much, and in such an imperfect way, to get the many misdoings of the defendants properly reviewed, but without any further taxing of the patience of this honorable court, we very respectfully submit our case upon this Brief to its kind consideration, fully believing that we have a right to have the judgment of the court below sustaining wholesale the demurrer to our declaration reversed, with costs.

Very respectfully submitted by

J. J. WATERS,

Attorney for Plaintiff, Mrs. Magruder.